United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 22,665

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT L. ACKERLY,

Plaintiff-Appellant,

v.

HERBERT L. LEY, Commissioner of Food and Drugs, Department of Health, Education and Welfare,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

* Cases and authorities chiefly relied upon are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,665

ROBERT L. ACKERLY,

Plaintiff-Appellant,

v.

HERBERT L. LEY, Commissioner of Food and Drugs, Department of Health, Education and Welfare,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED*

1. Whether, since plaintiff has all the factual documents which he requested, the portion of the complaint dealing with his right to obtain these documents under the Freedom of Information Act is moot.

2. Whether plaintiff's demand for the agency's internal memoranda is contrary to the exemption in the Freedom of Infor-

---

* On May 8, 1969, defendant moved to dismiss, as moot, the appeal from that portion of the order below dealing with factual information sought by plaintiff; and to summarily affirm, as presenting no substantial issue, the remaining portion of the order below, dealing with plaintiff's request for internal agency memoranda. This Court has ordered that the pending motion be heard together with the appeal on the merits.

mation Act for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552 (b)(5)(Supp. IV, 1965-68).[1/]

COUNTERSTATEMENT OF THE CASE

Plaintiff brought this action under the new Public Information Section to the Administrative Procedure Act (the "Freedom of Information Act"), 5 U.S.C. 552(Supp. IV, 1965-68), to compel the defendant Commissioner of Food and Drugs to disclose certain documents to him (App. 3-6).[2/] The district court, on cross-motions for summary judgment, dismissed the action (App. 40).

The factual and statutory background of this case is set forth below.

1. The Federal Hazardous Substances Act, 15 U.S.C. 1261, et seq., authorizes the Secretary of Health, Education and Welfare to require appropriate labeling for "hazardous" substances. Congress amended the Act in 1966 to authorize the Secretary to ban entirely from interstate commerce those substances which, he finds, present such a hazard to the public health and safety that cautionary labeling is an inadequate protection. 80 Stat. 1303, 1304. In determining whether a substance is to be a "banned hazardous substance" the Secretary

---

1/ Defendant also contends that certain of the disputed documents are exempt from disclosure under Exemption 7 of the Information Act, as "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. 552(b)(7)(Supp. IV, 1965-68).

2/ "App." refers to the Joint Appendix,on file with the Clerk of this Court.

must follow the rulemaking procedures set out in Section 701(e)-(g) of the Federal Food, Drug, and Cosmetics Act, 21 U.S.C. 371(e)-(g). 80 Stat. 1305.

As this Court noted in Pharmaceutical Manufacturers Ass'n. v. Gardner, 127 U.S. App. D.C. 103, 105-106, 381 F. 2d 271, 273-274 (1967), Section 701 (e) appears to contemplate a two-stage procedure. The first stage is the publication of a proposal in the Federal Register and the receipt of comments upon it. Thereafter, the Secretary "shall by order act upon such proposal"; and, for 30 days after the publication of such order, persons adversely affected by it may file objections "specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections." The filing of such an objection automatically stays the effectiveness of the order in respect of the matter complained of;[3] and, at the subsequent public hearing, evidence will be received and interested persons will be heard. After the hearing, the Secretary must act on the objections by an order "based only on substantial evidence of record" and "detailed findings of fact."[4] Except for emergencies, the

---

3/ The order may not be made effective prior to the day following the last day on which objections may be filed. 21 U.S.C. 371(e).

4/ Dyestuffs & Chemicals, Inc. v. Fleming, 271 F. 2d 281 (C.A. 8, 1959), certiorari denied, 362 U.S. 911, upheld the Secretary's view that the statutory right to a hearing under Section 701(e) is limited to "legally sufficient" and non-frivolous objections.

statute provides for a further 90-day delay in the effectiveness of the order, during which any aggrieved person may seek review of the order in a United States court of appeals. 5/

2. On February 16, 1968, the defendant Commissioner of Food and Drugs, as delegate of the Secretary of Health, Education and Welfare, published in the Federal Register a proposal to classify carbon tetrachloride and mixtures containing it as "banned hazardous substances" within the meaning of the Federal Hazardous Substances Act. 33 Fed. Reg. 3076. The notice stated that "information gathered from investigations and other sources indicates that the degree or nature of the hazard involved in the presence or use of such substances in or around the household is such that the objective of the protection of the public health and safety can be adequately served only by keeping these substances out of the channels of interstate commerce." Ibid. The notice also invited all interested persons to submit their views on this proposal. Ibid.

5/ This Court in Pharmaceutical Manufacturers, supra, observed that the legislative history of Section 701(e) "suggests that what Congress had in mind when it enacted the two-stage procedure was the paramount consideration of expediting new regulations over which there would be no controversey. In such expediting there would, of course, be savings of time and expense for all concerned, but the constant refrain was that such savings would occur only when the proposals were not controversial." 381 F. 2d at 278. With respect to issues of "a controversial nature", the Court noted, Congress intended that the second stage, involving an evidentiary hearing and detailed findings of fact, would be "critical." Ibid.

On May 24, 1968, the Commissioner published in the Federal Register an order classifying carbon tetrachloride and mixtures containing it as "banned hazardous substances" within the meaning of the Federal Hazardous Substances Act. 33 Fed. Reg. 7685.[6/] The accompanying notice stated that 23 comments had been received in response to the earlier proposal, and that "After consideration of all comments received, and in the light of all the information available, the Commissioner of Food and Drugs concludes that the proposal should be adopted without change." Ibid.

On June 20, 1968, plaintiff, as counsel for the Chemical Specialties Manufacturers Association, Inc., objected to the Commissioner's order and requested a public hearing on the question of whether carbon tetrachloride and mixtures containing it should be classified as "banned hazardous substances" within the meaning of the Federal Hazardous Substances Act (App. 39). The filing of this objection automatically stayed the effectiveness of the Commissioner's order. 21 U.S.C. 371(e). On July 27, 1968, the Commissioner ordered that the effective date of his order be further stayed pending resolution of the contested issues at a public hearing. 33 Fed. Reg. 10715. On March 27, 1969, the Commissioner appointed an independent hearing examiner to conduct the public hearing, and scheduled a prehearing conference. 34 Fed. Reg. 5721. On April 14 and 22, 1969, a prehearing conference was held. The hearing in chief began on May 19, 1969 and is still pending. Carbon Tetrachloride Docket No. FDC-HS-1.

6/ The order did not cover carbon tetrachloride for industrial use or for use in laboratories.

3. On February 21, 1968, plaintiff, citing the new Public Information Section to the Administrative Procedure Act ("the Freedom of Information Act"), 5 U.S.C. 552 (Supp. IV, 1965-68), requested the Food and Drug Administration to permit him to inspect all its records "which relate in any way to" the hazards involved in the household presence or use of carbon tetrachloride and mixtures containing it (App. 8). The agency made a number of its records available to plaintiff, but refused to disclose: (1) certain internal agency memoranda, and (2) certain factual records relating to deaths or injuries resulting from carbon tetrachloride, which information had been submitted to the agency in confidence (App. 9-14). Thereafter, on April 17, 1968, plaintiff brought this action in the district court to compel the defendant Commissioner of Food and Drugs to permit him to inspect the withheld internal agency memoranda and confidential factual data (App. 3-6). On November 25, 1968, the district court, which has examined these documents in camera, granted the Commissioner's motion for summary judgment (App. 40).

4. The affidavit, dated July 9, 1968, made by Mr. J. Kenneth Kirk, Associate Commissioner for Compliance, United States Food and Drug Administration, described the contents of the agency's file regarding carbon tetrachloride as embodying described items "a" through "h," inclusive (App. 20-21). When the instant action was commenced, the agency had already disclosed to plaintiff items "a," "b" and "c" (App. 18-19). Thus,

at the time this action was commenced, the only requested records that the agency had refused to disclose to plaintiff were items "d" through "h" (App. 21). At the prehearing conference conducted in the carbon tetrachloride matter on April 14 and 22, 1969, the agency turned over to plaintiff, as counsel for the Chemical Specialties Manufacturers Association, all the factual documents regarding carbon tetrachloride which he had requested (described in item "g" as "medical records relating to the death gathered during that investigation and for purposes of the report"). Counsel for the Commissioner explained that appropriate releases for these confidential medical reports had been obtained by the agency (Transcript of Hearing, pp. 41-43 , 136-149).[7/]

Thus, at present, the only documents requested by plaintiff to which he has not had access are items "d," "e" and "f"; item "h"; and the "Report" and "memoranda of interview" described in item "g" of the Kirk affidavit (App. 21). Mr. Kirk's

---

7/ Plaintiff stated at the hearing (Transcript, pp. 76-77):

> Today is the first time I have seen the evidence they intend to proceed on. Today is the first time I have a list of the witnesses which they intend to call.
>
> * * * * *
>
> I am going to ask the Examiner to postpone the hearing in this case for 30 days, to give me an opportunity to evaluate the evidence, which is all I have ever asked for and the only reason we are here taking your time is because up until today they refused to give me this information. * * * [Emphasis added].

affidavit describes the foregoing documents as follows (App. 21):

> d. Briefing memorandum to the Commissioner of Food and Drugs regarding the declaration of carbon tetrachloride as a banned hazardous substance;
>
> e. Memoranda of telephone conversation between an employee of the United States Food and Drug Administration and individuals in other agencies of the Federal Government respecting viewpoints and opinions regarding the danger of carbon tetrachloride.
>
> f. Memoranda of telephone coversations between an employee of the United States Food and Drug Administration and Underwriter's Laboratory, Inc. staff members respecting the known or potential danger of carbon tetrachloride.
>
> g. Report prepared by the Detroit District of the United States Food and Drug Administration on its investigation into a death reported due to inhalation of carbon tetrachloride, together with the various memoranda of interview written by United States Food and Drug Administration Inspectors during the investigation. * * *;
>
> h. Memorandum from the Office of Legislative Services to the Associate Commissioner for Compliance regarding carbon tetrachloride.

The agency had earlier informed plaintiff that "internal communications concerning the carbon tetrachloride proposal" would not "be available by law to a private party in litigation with the Agency" since "internal drafts, memoranda between officials, and opinions and interpretations prepared by Agency staff personnel are not routinely available to a party in litigation with the Agency" (App. 14).

ARGUMENT

I

SINCE PLAINTIFF HAS ALL THE FACTUAL DOCUMENTS WHICH HE REQUESTED, THE PORTION OF THE COMPLAINT DEALING WITH HIS RIGHT TO OBTAIN THESE DOCUMENTS UNDER THE FREEDOM OF INFORMATION ACT IS MOOT.

As noted above (pp. 6-8), plaintiff has been given access to all the factual documents regarding carbon tetrachloride which he requested. Thus, the portion of the complaint dealing with his right to obtain these documents under the Freedom of Information Act is moot. We submit, therefore, that it would be appropriate for this Court to enter an order dismissing the appeal as moot to the extent that the appeal is taken from the portion of the district court's order dealing with this aspect of the complaint.[8/]

8/ The Court denied a motion to dismiss as moot in American Mail Line, Ltd. v. Gulick, ____ U.S. App. D.C. ____, ___ F. 2d ___ (C.A.D.C., No. 22,091, February 17, 1969), on the ground that, while defendants argued that plaintiffs no longer needed the disputed memorandum, plaintiffs were entitled to inspect the memorandum irrespective of their need for it. In short, Gulick ruled that the appeal there was not moot since plaintiffs did not have access to the particular document sought by them under the Information Act. In the instant case, however, plaintiff has been given access to the particular documents (of a factual nature) sought by him, i.e., the medical reports described in item "g" of the Kirk affidavit.

While plaintiff undoubtedly would like this Court to render an advisory opinion on whether plaintiff should have been given these documents earlier, the fact remains that plaintiff has now been given the very documents (of a factual nature) sought by him. The appeal is therefore moot to the extent that plaintiff seeks these documents.

It should also be emphasized that defendant believes that the factual documents are exempt from required disclosure under the Information Act, since they are part of a file compiled by the agency in an investigation of violations of law with respect to labeling requirements for carbon tetrachloride. 5 U.S.C. 552(b)(7). See, also, infra, p. 30, fn. 17. But since the appeal is plainly moot as to these documents, there is no reason for the Court to consider whether the agency is correct in its belief that exemption (7) applies.

II

PLAINTIFF'S DEMAND FOR THE AGENCY'S INTERNAL MEMORANDA IS CONTRARY TO THE EXEMPTION IN THE FREEDOM OF INFORMATION ACT FOR "INTER-AGENCY OR INTRA-AGENCY MEMORANDUMS OR LETTERS WHICH WOULD NOT BE AVAILABLE BY LAW TO A PARTY OTHER THAN AN AGENCY IN LITIGATION WITH THE AGENCY." 5 U.S.C. 552(b)(5)(Supp. IV, 1965-68).

The remaining portion of the order below rejected plaintiff's demand for the agency's internal memoranda (supra, pp.6-8). As we now show, plaintiff's demand for these documents is contrary to the exemption in the Information Act for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5)(Supp. IV, 1965-68).

1. As made clear by the affidavit of Mr. Kirk, the Associate Commissioner for Compliance (App. 20-21; supra, p. 8), plaintiff seeks to obtain memoranda prepared by subordinates in the United States Food and Drug Administration stating their viewpoints and opinions regarding the dangers of carbon tetrachloride, and their recommendations for action to be taken with respect to those dangers. However, as this Court has frequently recognized, a privilege "obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C., 1966), affirmed per curiam sub nom.

V.E.B. Carl Zeiss Jena v. Clark, "for the reasons stated in" the district court opinion, 128 U.S. App. D.C. 10, 384 F. 2d 979 (1967), certiorari denied, 389 U.S. 952; Boeing Airplane Co. v. Coggeshall, 108 U.S. App. 106, 280 F. 2d 654, 660 (C.A.D.C., 1960); Machin v. Zuckert, 114 U.S. App. D.C. 335, 338, 316 F. 2d 336, 339 (C.A.D.C., 1963), certiorari denied, 375 U.S. 896.

In Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F. 2d 654 (1960), a litigant attempted to obtain certain documents from the Renegotiation Board to aid it in its defense of an excess profit claim. This Court clearly distinguished between factual and non-factual material, holding (280 F. 2d at 660-661; emphasis added):

> To the extent that the documents deal with recommendations as to policies which should be pursued by the Board, or recommendations as to decisions which should be reached by it, the claim of privilege is well founded.
>
> * * * * *
>
> But the files of the Board may well contain investigatory or other factual reports * * * which are relevant to a determination of excess profits. Investigatory or factual reports not containing state or military secrets -- and the Government does not suggest that any such secrets are here involved -- have not ordinarily, without more, supported claims of privilege. [Footnote omitted.]

The same distinction was made by this Court in Machin v. Zuckert, 114 U.S. App. D.C. 335, 316 F. 2d 336 (1963), certiorari denied, 376 U.S. 896, where Machin sought the production of an entire Air Force investigative file relating to an accident. This Court there held that "a recognized

privilege attaches to any portions of the report reflecting Air Force deliberations or recommendations as to policies that should be pursued." 316 F. 2d at 339. (Emphasis added.) It went on to hold (id., at 339-340; emphasis added):

> The parties, in argument before us, have treated the investigative report as a unit that should either be entirely disclosed or entirely suppressed. From our review of the case, however, it appears to us that certain portions of the report could be revealed without in any way jeopardizing the future success of Air Force accident investigations. We refer to the factual findings of Air Force mechanics who examined the wreckage. [Footnote omitted.] 9/

Accord, Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C., 1966), affirmed per curiam sub nom. V.E.B. Carl Zeiss Jena v. Clark, "for the reasons stated in" the district court opinion, ___ U.S. App. D.C. ____, 384 F. 2d 979 (1967), certiorari denied, 389 U.S. 952:

> * * *[I]t is well established that the privilege obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. [Footnote omitted.]

9/ Notwithstanding the Court's later reference to "opinions" and "conclusions" (316 F. 2d at 341), the findings of the mechanics in Machin were essentially "factual". As the Court noted, the important consideration is whether agency investigations and reports might be inhibited by future disclosure (316 F. 2d at 340); although no such inhibition could exist with respect to the essentially factual findings of the mechanics in Machin, precisely the contrary is true with respect to the opinions and recommendations of the agency subordinates in the instant case as to the dangers of carbon tetrachloride and the action which the agency should take with respect to those dangers.

The reasoning behind this rule is apparent: the head of an executive agency must depend upon full and frank advice and recommendations from his subordinates, just as a judge often considers the frank opinion of his law clerk, and a legislator the unbiased reporting of his staff. If the subordinate were to suspect that, in some future litigation, his opinion would be made public (perhaps to the very persons who were the subjects of the communications to his superior), he might well tend to confine himself in the future to oral communications, or remain noncommittal and guarded in his opinions.

This reasoning has been clearly articulated in the cases. Mr. Justice Reed, sitting by designation in Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 945-946 (Ct. Cl., 1958), stated (emphasis added; footnote omitted):

> Here the document sought was intra-office advice on policy, the kind that a banker gets from economists and accountants on a borrower corporation, and in the Federal government the kind that every head of an agency or department must rely upon for aid in determining a course of action or as a summary of an assistant's research. * * * Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

> There is a public policy involved in this claim of privilege for this advisory opinion -- the policy of open, frank discussion between subordinate and chief concerning administrative action.
>
> When this Administrator came to make a decision on this $36,000,000 contract, with intricate problems of accounting and balancing of interest, he needed advice as free from bias or pressure as possible. It was wisely put into writing instead of being left to misinterpretation but the purchaser, plaintiff here, was entitled to see only the final contracts, not the advisory opinion.

Accord, N.L.R.B. v. Botany Worsted Mills, Inc., 106 F. 2d 263, 267 (C.A. 3, 1939).

As the above-cited cases and analysis make clear, the internal agency memoranda sought by plaintiff in this case would be subject to a claim of privilege in an ordinary discovery proceeding, and consequently "would not be available by law to a party other than an agency in litigation with the agency." It is thus within the literal language of exemption (5), 5 U.S.C. 552(b)(5). We will now show that this interpretation is supported by authority, is in accordance with the purposes of the Public Information Section of the Administrative Procedure Act as found in the legislative history, and is in fact the only reasonable interpretation of this exemption.

3. In Freeman v. Seligson, ____ U.S. App. D.C. ____, 405 F. 2d 1326 (1968), a trustee in bankruptcy sought to examine Department of Agriculture files in order to obtain more information about the bankrupt's affairs. The trustee was upheld by the referee and the district court, but this Court reversed and remanded, laying down "the legal principles which the [district] court should then observe." 405 F. 2d at 1332. With respect to certain documents, this Court noted that, in future proceedings, "privileges of certain types will be asserted," and therefore, "we should lay down general guidelines in this regard * * *." 405 F. 2d at 1339. With respect to the precise problem involved in the instant case, this Court in Selgison unanimously held (405 F. 2d at 1339, and n. 70; emphasis added):

> Affidavits furnished by the Secretary assert that many of the papers sought * * * contain intra- and inter-agency advisory opinions and recommendations submitted for consideration in the performance of decision - and policy-making functions. This claim, if appropriately advanced and supported, would preclude disclosure of these documents. In Boeing Airplane Co. v. Coggeshall [supra, 280 F. 2d 654, 660], we held that recommendations as to Renegotiation Board decisions and policies were protected against normal production requirements. Later, in Machin v. Zuckert, [supra, 316 F. 2d 336, 339], we held similarly that memoranda reflecting recommendations and deliberations on Air Force policy were immune from revelation. Still more recently, V.E.B. Carl Zeiss, Jena v. Clark [supra, 384 F. 2d 979] affirmed without opinion a ruling that "the privilege obtains

with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." These decisions have, since the District Court's holdings in this case, been fortified by a clear expression of congressional policy to hold the line on disclosure of materials of this sort. 70/

---

70 / Pub. L. 89-487, 80 Stat. 250 (1966), effective July 4, 1967, as incorporated by Pub. L. 90-23, 81 Stat. 54 (1967), into 5 U.S.C. §552, is designed "to provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements," with nine stated exemptions. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966). While inapplicable to this litigation, the history of this legislation reflects current congressional policy regarding public access to governmental records.

Within one exemption are "[i]nter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." 5 U.S.C. §552(e)(5) [sic -- this is the unofficial text; the citation should be "Section 3(e)(5) of P.L. 89-487"]. As the House report points out, "[a]gency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). See also S. Rep. No. 813, 89th Cong., 2d Sess. 9 (1965).

The import of Seligson is plain: exemption (5) displays a "clear expression of congressional policy to hold the line on disclosure of materials of this sort," i.e., those containing "advisory opinions, recommendations and deliberations" concerning agency action and policies. The legislative history cited by this Court shows conclusively that Congress was adopting the identical policy reasons for exemption (5) as those given by the courts in prohibiting discovery of non-factual agency memoranda when privilege is asserted by the agency involved. See Kaiser Aluminum & Chemical Corp. v. United States, supra. As we now show, other citations from the legislative history of the Act demonstrate the desire by Congress to secure this type of material from public inspection.

4. Exemption (5) made its first appearance as Section 3(c) of S. 1666, 88th Cong., 1st Sess. (1963), which exempted:

> the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters.

At the hearings held by the Senate Judiciary Committee in October 1963, on S. 1666 and a related bill, a number of officials of government agencies emphasized the need for a broader exemption, including material dealing with policy matters regardless of whether adjudicatory or rule-making were involved. 10/ Congress subsequently acted on the

---

10/ Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, on S. 1666 and S. 1663, 88th Cong., 1st Sess., October, 1963, e.g., pp. 202-203, 247.

Government suggestion that the exemption be broadened. Thus, Section 3(c)(5) of the new version of the bill, reported favorably by the Senate Judiciary Committee, exempted:

> intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy.

In discussing this broader exemption, the Committee Report stated (S. Rep. No. 1219, 88th Cong., 2d Sess., 1964, pp. 6-7, 13-14):

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency [of] Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation. All <u>factual</u> material in Government records is to be made available to the public, as well as final agency determinations on legal and policy matters which affect the public. [Emphasis in original.]
>
> * * * * *
>
> Exception No. 5 would exempt "intraagency or interagency memoranda or letters dealing solely with matters of law or policy." This exemption was made upon the strong urging of virtually every Government agency. It is their contention, and one that the committee believes has merit, that there are certain governmental processes relating to legal and policy matters which cannot be carried out efficiently if they must be carried out "in a goldfish bowl." <u>Government officials</u>

> would be most hesitant to give their frank and conscientious opinion on legal and policy matters to their superiors and co-workers if they knew that, at any future date, their opinions of the moment would be spread on the public record. The Committee is of the opinion that the Government cannot operate effectively or honestly under such circumstances. Exception No. 5 has been included to cover this situation, and it will be noted that there is no exemption for matters of a factual nature. [Emphasis added.]

The Government's position in the instant case, that Congress intended to exempt memoranda containing opinions and recommendations as opposed to factual matters, is clearly supported, if not compelled, by the above congressional material. It was even more clearly brought out when Senator Humphrey suggested that the section be amended to exempt "matters of fact." He supported this suggestion by arguing that (110 Cong. Rec. 17667):

> As presently written clause (5) of the amended Section 3(c) appears not to exempt intra-agency or inter-agency memorandums or letters dealing with matters of fact. For example, clause (5) would apparently not exempt memorandums prepared by agency employees for themselves or their superiors purporting to give their evaluation of the credibility of evidence obtained from witnesses or other sources. The knowledge that their views might be made public information would interfere with the freedom of judgment of agency employees and color their views accordingly. Memorandums summarizing facts used as a basis for recommendations for agency action would likewise appear to be excluded from the exemption contained in clause (5).

Senator Long's comment opposing this amendment was that it would

(id., at 17667-17668; emphasis added):

> result in a great lessening of information available to the public and to the press. Furthermore, the example cited with respect to intra-agency memorandums giving * * * the credibility of evidence obtained from witnesses or other sources, leads me to point out that there is nothing in this bill which would override normal privileges dealing with the work product and other memorandums summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public.

While the above material indicates that Congress intended to distinguish between fact and opinion in exemption (5), a fear was expressed that the wording "solely with matters of law or policy" would make the exemption inapplicable to a memorandum containing both facts and opinions. Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 89th Cong., 1st Sess., May, 1965, e.g., pp. 36, 205. Consequently, in S. 1160, 89th Cong., 1st Sess., 1965, the bill which was ultimately enacted into law, the exemption read (Section 3(e)(5)):

> inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency.11/

11/ As enacted by P.L. 89-487, 80 Stat. 250, S. 1160 also defined "private party" as "any party other than an agency." Section 3(g), 80 Stat. 251. When the statute was codified by P.L. 90-23, 81 Stat. 54, this definition was incorporated into exemption (5) to give the present wording of 5 U.S.C. 552(b)(5), "available by law to a party other than an agency * * *."

In commenting on this exemption, the Senate Judiciary Committee stated (S. Rep. No. 813, 89th Cong., 1st Sess., 1965, pp. 2, 9; emphasis added):

> The purpose of clause (5) is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency.
>
> * * * * *
>
> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition * * * .

The House Government Operations Committee Report concurred (H.R. Rep. No. 1497, 89th Cong., 2d Sess., 1966, p. 10; emphasis added):

> Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public.

This report was used by this Court in Seligson in reaching its conclusion that Congress intended by exemption (5) "to hold the line on disclosure of materials" containing "'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Freeman v. Seligson, supra, 405 F. 2d at 1339, quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra. We know of no indication in the legislative history that Congress intended to make these items available in suits under this Act.

Any other reading of exemption (5) would render it a nullity. If both factual and opinion or conclusory material may be obtained under the Act, then all internal agency documents may be obtained. It might be suggested that the section be limited to prohibiting the disclosure of military or state secrets, since this category of documents also has been thought to be immune from discovery. See Boeing Airplane Co. v. Coggeshall, supra, 280 F. 2d at 660-661. However, such material is already exempt under 5 U.S.C. 552(b)(1), so that exemption (5) would be redundant if limited to this purpose.

For these reasons, this Court should adhere to its previous ruling in Seligson, supra, and hold that the internal agency memoranda are covered by exemption (5) since they would be privileged and thus not available "to a party other than an agency in litigation with the agency." That holding will best effectuate the purposes of the Act, as stated by the President upon signing

it into law:

> Officials within the Government must be able to communicate with one another fully and frankly without publicity. * * *
>
> I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people.

2 Weekly Compilation of Presidential Documents 895 (July 11, 1966).[12/]

12/ An additional reason supporting the Government's position is the fact that it follows the authoritative administrative interpretation given the Act. See Udall v. Tallman, 380 U.S. 1, 16-17 (1964). The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June, 1967), drafted in "close consultation" with the House Subcommittee on Foreign Operations and Government Information, see 113 Cong. Rec. H 7459 (daily ed., June 19, 1967) (remarks of Congressman Moss), adopts the view (p. 35) that "opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups, remain exempt so that free exchange of ideas will not be inhibited." The guidelines in the Attorney General's Memorandum were approved by Congressman Moss, a leading proponent of the Act, as "positive and workable." 113 Cong. Rec. 7459, supra.

5. Plaintiff argues that the internal agency memoranda involved here do not fall within exemption (5) because "The degree or nature of the hazard is a condition of fact, not a matter of administrative policy" (Brief of the Appellant, p. 20). This contention is baseless. As the record makes clear (supra, p. 8), the memoranda in question here (Items "d," "e," "g" and "h") express the subjective judgment and evaluation of agency subordinates with respect to the dangers of carbon tetrachloride, and their opinions, deliberations and recommendations as to the action which the agency should take with respect to those dangers. In short, the internal agency memoranda fall precisely within the language and rationale of exemption (5).[13/]

13/ One of the disputed documents (Item f-App. 21) is a memorandum of a telephone coversation between an employee of the Food and Drug Administration and a private laboratory. Exemption (5) applies to this document since it constitutes an internal memorandum which reflects the mental process of a subordinate employee of the agency with respect to the dangers of carbon tetrachloride. See United States v. Morgan, 313 U.S. 409, 422 (1939):

> * * * [T]he short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Morgan v. United States, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicity held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such scrutiny, compare, Payerweather v. Ritch, 195 U.S. 276, 306-07, so the integrity of the administrative process must be equally respected. See Chicago, B. & Q. Ry., Co. v. Babcock, 204 U.S. 585, 593. It will bear repeating that although the administrative process

(footnote continued on next page)

6. While plaintiff relies extensively on American Mail Line, Ltd. v. Gulick, ___ U.S. App.____, ____ F. 2d ____ (C.A.D.C., No. 22,091, decided February 17, 1969), that case is, as this Court stated, "a unique case, and must be dealt with as such." Slip. Opin., p. 8. The Court determined in American Mail Line that a staff memorandum to the Maritime Subsidy Board was not an "intra-agency" memorandum under exemption (5) since the Board had expressly adopted the reasoning of the staff memorandum as the basis for a Board ruling determining plaintiffs' rights. Slip Opin., pp. 12-13. In the instant case, however, the Commissioner of Food and Drugs has not relied upon any internal agency memorandum as the basis for either his initial proposal (33 Fed. Reg. 3076) or order (33 Fed. Reg. 7685) regarding carbon tetrachloride. Rather, the Commissioner merely noted that he had, in his deliberations, "considered" certain "information" in the agency files, viz., factual information and published materials with respect to the dangers of carbon tetrachloride--which factual information and published materials have been turned over to the plaintiff (App. 18; supra, pp. 6-8). 14/ The American Mail Line decision, therefore, has no application here.

13/ continued

> has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other [emphasis added].

Moreover, as noted above (p. 30, fn. 17), this document also falls within exemption (7), 5 U.S.C. 552(b)(7).

14/ The Commissioner will, of course, make "detailed findings of fact" at the conclusion of the pending evidentiary hearing. Section 701(e) does not require that the initial proposal or order be accompanied by a statement of reasons or opinion.

7. Plaintiff also seems to argue (Brief of the Appellant, p. 18) that the agency's internal staff memoranda "would * * * be available" in litigation with the agency, because plaintiff allegedly has a "need" for the documents, and this "need" would, in a discovery proceeding, override the privilege which generally attaches to documents of that type. In other words, plaintiff's argument seems to be that, although the agency's staff memoranda might not be available to a member of the general public (since he could not show such a "need"), plaintiff has a superior right to compel production of the documents.

We think it sufficient to point out that plaintiff cannot, in fact, demonstrate any "need" which would entitle him, in a discovery proceeding, to override the normal privilege which attaches to internal governmental memoranda. Plaintiff asserted at the prehearing conference in the carbon tetrachloride matter that no facts were in dispute -- the issue before the examiner being solely a "legal" question (Transcript of Hearing, pp. 116-117, 129). Plaintiff does not explain why he "needs" the agency's staff memoranda to help him cope with the legal question presented. Doubtless, plaintiff would enjoy roaming through the files of the Food and Drug Administration, just as a respondent charged with an unfair method of competition would enjoy roaming through the files of the Federal Trade Commission, or a party charged with a securities law violation would enjoy roaming through the files of the Securities and Exchange Commission. But plaintiff's preferences do not constitute a "need."

Moreover, as we now demonstrate, plaintiff's argument concerning "need" assumes a construction of exemption (5) which is totally at odds with one of the fundamental purposes of the Public Information Section of the Administrative Procedure Act, as well as with its unambiguous language.

The former Section 3 of the Administrative Procedure Act provided for the disclosure of public records "to persons properly and directly concerned * * *." 5 U.S.C. 1002(c) (1964 ed.) By contrast, the new Public Information Section of the Administrative Procedure Act provides that public information and records shall be made available "to the public" and to "any person." 5 U.S.C. 552(a) and (c). The change was deliberate. As the House Committee on Government Operations stated, one of the major changes of the new law was that "It eliminates the 'properly and directly concerned' test of who shall have access to public records, stating that the great majority of records shall be made available to 'any person.'" H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 1 (1966). The new law, the Committee stated, recognizes "the basic right of any person--not just those special classes 'properly and directly concerned'--to gain access to the records of official Government actions." Id., at p. 5. Thus, the Committee emphasized, the new law "establishes the basic principle of a public records law by making the records available to any person." Id., at p. 8. The Report of the Senate Judiciary Committee echoes this understanding of the new law, emphasizing that it:

> * * * eliminates the test of who shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what its Government is doing. There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside these limited areas, all citizens have a right to know. [Emphasis added.]

S. Rep. No. 813, 89th Cong., 1st Sess., pp. 5-6 (1965).

Exemption (5), 5 U.S.C. 552(b)(5), is drafted in conformity with the basic principle that the new Act is a "Public Information" law. Exemption (5) provides that inter-agency or intra-agency memorandums or letters are exempt from disclosure unless they would be available by law to "a party" other than an agency in litigation with the agency. The words are not "the applicant" or "the party requesting disclosure." The focus, as in the Act generally, is not on the particular applicant but on an abstract person, "a party." In other words, exemption (5), in accordance with the other provisions of the Public Information Section of the Administrative Procedure Act, does not establish the test of whether a particular applicant, as distinguished from a member of the public generally, would be entitled to discovery because his particular need is great. Contrary to plaintiff's assumption, therefore, the courts, in applying exemption (5), are not to look to the circumstances concerning the particular applicant, for that would result in a determination that one applicant is entitled to disclosure of a particular document under the new law, but another

applicant is not entitled to the same document. As we have seen, such a result is totally at odds with one of the basic purposes of the new law, as well as with its unambiguous meaning.

Instead, the meaning of Exemption (5) is quite different and very clear. As seen above (pp. 17-23), Congress recognized that documents containing advisory opinions, recommendations and deliberations are subject to a claim of privilege and are not generally discoverable in litigation. And this Court ruled in Seligson, supra, that Congress, in enacting exemption (5), intended to "hold the line" on disclosure of materials of this sort. Freeman v. Seligson, supra, 405 F.2d at 1339. The meaning of exemption (5), therefore, is clear and workable: if a document falls within the type of internal governmental material which would generally be subject to a claim of privilege, it is exempt from disclosure under the Public Information Section. The alternative approach suggested by plaintiff would result in a discrimination between different applicants, is contrary to the unambiguous meaning of the Act, and would turn a proceeding under the Public Information Section into an accelerated discovery contest. 15/

15/ Compare exemption (7), 5 U.S.C. 552(b)(7), which exempts "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." (Emphasis added.) As the House Committee emphasized in discussing this exemption, the Public Information Section "is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 11 (1966).

In Boeing Airplane Co. v. Coggeshall, supra, and Machin v. Zuckert, supra, this Court did to some extent weigh the Government's need for confidentiality against the need for disclosure. (continued)

Our understanding of the meaning of exemption (5) is confirmed by the Report of the House Committee on Government Operations (H.R. Rep. No. 1497, 89th Cong., 2d Sess., 1966, p. 10); by the Attorney General's Memorandum, supra, at p. 35; and by the analysis of Professor Davis in "The Information Act: A Preliminary Analysis," 34 U. Chi. L. Rev. 761, 795-796 (1967).[16]

Moreover, the dictum in Gulick, supra (Slip Opin., p. 13), upon which plaintiff relies (Brief of the Appellant, p. 18), is not inconsistent with the foregoing interpretation of exemption (5). As pointed out elsewhere in the Gulick opinion (Slip Opin., p. 14), a party's right to disclosure under the Information Act does not depend upon his "need" for disclosure. Moreover, as seen above (p. 26), plaintiff has shown no "need" to inspect the agency's internal memoranda.[17]

CONCLUSION

For the foregoing reasons, this Court should: (1) dismiss, as moot, the appeal from that portion of the order below dealing with factual documents sought by plaintiff; and (2) affirm the

---

15/ (continued) However, it did this with respect to documents of a factual nature or reports from persons outside the Government. With respect to internal government documents dealing with recommendations as to policies which should be pursued or decisions which should be reached, this Court flatly held that such documents were privileged, without engaging in a weighing approach.

16/ These authorities point out that internal memoranda must be disclosed under exemption (5) if they "routinely" would be made available to a private party through the discovery process in litigation, and not otherwise. In other words, these authorities recognize that the question under exemption (5) is whether the document falls within the general class of material which would be subject to a claim of privilege and therefore would not ordinarily be available.

17/ Certain of the disputed memoranda (Item g -- App. 21) also fall within exemption (7), 5 U.S.C. 552(b)(7) ("investigatory

(footnote continued on next page)

remaining portion of the order below, dealing with plaintiff's request for internal agency memoranda.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

MAY 1969.

17/ (continued) files compiled for law enforcement purposes except to the extent available by law to a party other than an agency"), since they were made in the course of an investigation of possible violations of the labeling requirements regarding carbon tetrachloride. Other documents, e.g., Item f, also fall with exemption (7). See Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D. P.R., 1967); Clement Brothers Co. v. N.L.R.B., 282 F. Supp. 540 (N.D. Ga., 1968); H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 11. However, in view of the clear applicability of exemption (5) to all of the disputed documents, the Court need not reach the question of the applicability of exemption (7).